

FEDERAL COMMUNICATIONS COMMISSION

FCC 97-395

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re)	
)	
GERARD A. TURRO)	MM Docket No. 97-122
)	
For Renewal of License)	File Nos. BRFT-970129YC
for FM Translator Stations)	BRFT-970129YD
W276AQ(FM), Fort Lee, NJ and)	
W232AL(FM), Pomona, NY)	
)	
MONTICELLO MOUNTAINTOP)	
BROADCASTING, INC.)	
)	
Order to Show Cause Why the)	
Construction Permit for FM Radio)	
Station WJUX(FM), Monticello, NY,)	
Should Not be Revoked)	

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1997

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Released: November 18, 1997

By the Commission: Chairman Kennard not participating.

1. This order grants the Petition for Special Authority to Take Deposition, filed June 26, 1997 by Gerard A. Turro (Turro), thereby authorizing Turro to take the oral deposition of the Commission field engineer responsible for conducting on-site inspections of station WJUX(FM), of Turro's studios in Dumont, New Jersey and of Turro's Fort Lee, New Jersey translator facility. Turro may depose the Commission employee regarding Issues 1 through 3 and 5 through 7, which were specified against the above-captioned licensees by Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 6264 (1997).¹ In granting this Petition, we emphasize the special circumstances prevailing

¹The designated issues seek to determine: whether Turro's operation of his translator stations violated certain Commission rules (Issue 1); whether Turro engaged in an unauthorized transfer of control or otherwise assumed control over station WJUX(FM), Monticello, New York (Issue 2); whether Turro misrepresented facts and/or lacked candor concerning the operation of his translator stations (Issue 3); whether Monticello Mountaintop Broadcasting Inc. (MMBI) violated the main studio rule (Issue 5); whether MMBI engaged in an

here and reiterate that Commission personnel are generally to be questioned by written interrogatory.

BACKGROUND

2 Gerard Turro is the licensee of FM Translator Stations in Fort Lee, New Jersey and in Pomona, New York. Pursuant to a Program Affiliation Agreement with Monticello Mountaintop Broadcasting Inc. (MMBI), Turro provides "Jukebox Programming" that is broadcast on a full-time basis on MMBI's full-service FM station WJUX in Monticello, New York. Turro and MMBI are also parties to rebroadcast agreements whereby station WJUX's programming is broadcast over Turro's two FM translator stations.

3. The Commission received a complaint that the operations of station WJUX(FM) and of Turro's two FM translator stations, as well as the business relationships between Turro and MMBI, violated Commission rules and policies relating to FM translator stations. This prompted an investigation into the relationship of Turro and his FM translator stations with MMBI, the licensee of station WJUX(FM). As part of this investigation, a Commission field engineer conducted inspections of station WJUX(FM), of Turro's Fort Lee FM translator station, and of his Dumont, New Jersey studio. Based upon the field engineer's observations during the on-site inspections, which appeared to conflict with the responses of Turro and MMBI to Letters of Inquiry subsequently directed to them, the Commission designated this proceeding for hearing. It specifically found: (1) that Turro apparently violated section 74.1231(b) of the rules regarding the requirement that a translator station directly receive and retransmit the primary signal that it carries; (2) that MMBI apparently violated the Commission's rules and policies regarding a broadcast station's main studio, which require the maintenance of a main studio within its principal community contour; and (3) that MMBI apparently abdicated control of, and Turro apparently assumed control of, station WJUX(FM), in violation of section 310(d) of the Communications Act and section 73.3540(a) of the rules. The Commission also found a substantial and material question of fact as to whether Turro and MMBI have misrepresented material facts or lacked candor concerning the operations of station WJUX(FM) and Turro's FM translator stations.

DISCUSSION

4. In its Petition for Special Authority to Take the Deposition of Serge Loginow, Jr., filed June 26, 1997, Turro seeks permission to take the oral deposition of the field engineer identified by the Bureau as the only member of the Commission's staff with personal knowledge of the facts recited in the HDO or of the field inspections conducted of these stations and of Turro's Dumont, New Jersey studio. Turro relies on the determination of

unauthorized transfer of control or abdicated control over WJUX(FM) (Issue 6) ; and whether MMBI misrepresented facts and/or lacked candor concerning the operation of station WJUX(FM) (Issue 7).

Administrative Law Judge Authur I. Steinberg that the deposition of Mr. Loginow is reasonably calculated to lead to the discovery of admissible evidence under Issues 1 through 3 and 5 through 7 and that orally deposing him is an appropriate means of discovery under the circumstances of this case. Memorandum Opinion and Order, FCC 97M-112 (rel. June 22, 1997). MMBI, the licensee of WJUX(FM) supports Turro's request to take Loginow's oral deposition. It urges that an oral deposition is the only way for the parties to explore adequately the testimony that Mr. Loginow might give, that such exploration is critical to both Turro and MMBI, and that disallowing the pre-trial oral examination of Loginow would make this proceeding fundamentally unfair.

5. The Mass Media Bureau filed an opposition to Turro's request on July 3, 1997, urging that Mr. Loginow should be questioned by written interrogatories rather than through a time-consuming and burdensome deposition. It submits that there has been no showing that written interrogatories are an inadequate means of discovering information known to the Commission. It claims that MMBI's pleading aptly illustrates, through a series of questions, that written interrogatories directed to Loginow would be an efficient, adequate means of discovery under the circumstances here. In reply, Turro urges that newly revealed information, consisting of potentially exculpatory material prepared by Loginow but not addressed in the HDO, confirms that it is essential that it be afforded an opportunity to take Loginow's oral deposition.

6. On September 16, 1997, Turro filed a Supplement to Petition for Special Authority to Take the Deposition of Serge Loginow, Jr., in which it urges that further developments emphasize the need for an oral deposition of Mr. Loginow. Turro asserts that Mr. Loginow was at all times relevant a Commission employee, who conducted and reported on his inspections and monitoring as part of his employment at the direction of the Mass Media Bureau. Nonetheless, Turro states that, in response to a request for admissions of fact based on information from Mr. Loginow, the Bureau variously responded "Unknown to the Bureau" and "Neither admit nor deny. The Bureau has no first-hand knowledge. The Bureau has no knowledge whether Loginow has such knowledge." Turro argues that the Bureau has attempted to curtail discovery by refraining from seeking answers from Mr. Loginow and by then merely saying that it does not know the answers known only to Mr. Loginow. In its response filed on September 24, 1997, the Bureau contends that it has disclosed and made available all materials relevant to this case and that there has been no prejudice to Turro's discovery rights. Inasmuch as the Bureau filed supplemental responses to Turro's request for admissions of fact on October 15, 1997, and Turro has filed no further objection in this regard, these contentions have no further relevance to the pending request to take Mr. Loginow's deposition.

7. While it is rare that we are willing to authorize oral depositions, we conclude that it is appropriate to authorize Turro to depose Mr. Loginow by oral examination at this time. Section 1.311(b)(2) of the Commission's rules, 47 C.F.R. § 1.311(b)(2), provides that

"Commission personnel may not be deposed for purposes of discovery except on special order of the Commission, but may be questioned by written interrogatories under section 1.323." As the Commission observed in adopting its discovery procedures, "At any one time, there are numerous hearing cases pending before the Commission. A multiplicity of demands on the Commission's limited staff would seriously interfere with its capacity to discharge its regular duties. The Commission is in this respect in a different position from that of private parties who will normally be called upon to give depositions only in the single case in which they are participating." Report and Order of Part I of the Rules of Practice and Procedure to Provide for Discovery Procedures, 11 FCC 2d 185, 188 para. 9 (1968) ("Report and Order"). The Commission further noted that "the written interrogatory may well be the most useful of the several procedural devices, since a party may, in one set of interrogatories, obtain an answer to each of his questions from the person best able to furnish it, without time-consuming questioning to determine in advance the particular staff member who has knowledge of the facts." Report and Order at 188 para. 9. Thus, Section 1.311(b)(2) was intended to address the interests of Commission personnel as well as parties seeking to discover information from them.

8. As the Bureau urges, Section 1.311(b)(2) contemplates that Commission personnel generally will be questioned by written interrogatories rather than by oral depositions. Nevertheless, an oral deposition is appropriate under the extraordinary circumstances of this case. The FCC field engineer's observations and inspection are critical to the determination of five of the seven issues designated for hearing. The Bureau, in response to Turro's First Set of Interrogatories, has identified Serge Loginow as the field engineer who conducted the inspections of Turro's Fort Lee translator station, of Turro's Dumont, New Jersey studio, and of MMBI's Monticello full-service station. The Bureau has also identified Mr. Longinow as the only Commission employee with personal knowledge of the inspections, and as a Bureau witness, who "will testify about the inspections he conducted." Memorandum Opinion and Order, FCC 97M-112 ¶ 3, citing Answers to Interrogatories. Moreover, this is a hearing to determine whether Turro is qualified to retain two licenses and whether MMBI will be permitted to retain its Monticello license. With almost every decisional issue turning on the inspector's personal observations, and in view of such severe potential consequences, we believe that circumstances warrant allowing Turro the opportunity to orally examine Mr. Loginow.

9. In two other cases, the Commission has considered requests for a special order authorizing oral depositions of its employees. In Scripps Howard Broadcasting Company, 9 FCC Rcd 4880 (1994), the Commission held that it would not entertain requests to depose Commission personnel for discovery purposes concerning matters related to their employment at the Federal Communications Commission, in the absence of an affirmative finding by the presiding Administrative Law Judge that the proposed examination was relevant to a designated issue in the proceeding. Here, the ALJ has made an affirmative finding of relevancy which is not disputed by the Bureau. As the ALJ noted, the specification of Issues

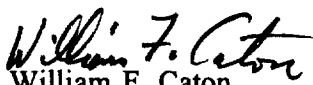
1 through 3 against Tares and Issues 5 through 7 against MMBI was largely based on the inspections conducted by Mr. Loginow.

10. In Rainbow Broadcasting Co., 11 FCC Rcd 8927 (1996), a case that had been remanded by the D.C. Circuit with instructions to make a specific factual determination,² the Commission found that oral depositions would "lead to the discovery of evidence that is admissible," and it would expedite the resolution of the proceeding. Here, those circumstances exist, perhaps to an even greater extent than in Rainbow. As noted above, Loginow's personal observations during the inspections formed the basis for specifying all of the substantive issues, including the misrepresentation/lack of candor issues. However, Loginow's personal observations are, as the ALJ found, more readily discoverable through an oral deposition than through written interrogatories. And, because an oral deposition provides an opportunity for immediate follow-up questions, it is potentially more efficient than the series of written interrogatories that might ultimately be required to elicit the same information from Loginow. In light of the unusual circumstances set forth above, and in order to insure the prompt and efficient resolution of this proceeding, we conclude that it is appropriate to allow the taking of Loginow's deposition at this time.

11. Such deposition should be scheduled as soon as possible to permit full exploration of any new areas of inquiry revealed by Loginow's deposition testimony. The scope of the deposition should, of course, be limited to the designated issues. We are confident, moreover, that the presiding ALJ, in accordance with his broad discretion under 47 C.F.R. § 1.313, will take any action that would be appropriate to avoid any demands on Loginow that would significantly interfere with his ability to discharge his regular duties.

12. ACCORDINGLY, IT IS ORDERED That the Petition for Special Authority to Take the Deposition of Serge Loginow, Jr., filed June 26, 1997 and Supplemented September 16, 1997 by Gerard A. Turro IS GRANTED, and that the Oral Deposition IS AUTHORIZED to the extent reflected herein.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

²Press Broadcasting Company v. FCC, 59 F. 3rd 1365 (D.C. Cir. 1995).